Does Israel have the right to self-defense? And what are the limitations?

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By Geir Ulfstein May 8, 2024

Much attention has been paid to Israeli violations of international humanitarian law (jus ***in bello)*** and possible genocide in Gaza. Less attention has been paid to Israel's claim of self-defense (jus ***ad bellum)*** against the terrorist attack of October 7, 2023. However, the rules of self-defense concern the legality of the overall purpose of operations and the choice of military strategy. This differs from the legality of targeting in individual operations as determined by international humanitarian law or a possible genocidal purpose of operations.

Marko Milanovic [here] has questioned the applicability of the prohibition on the use of force and the right to self-defense in the UN Charter, as well as the usefulness of the limitations of necessity and proportionality in customary law. The content of these limitations has also been discussed by Adil Ahmad Haque [here and here] and Charles Kels [here] and by other authors. In the absence of universal recognition of Palestine as a state, I will discuss the relevance of the rules of self-defense and point out their implications for the restrictions on Israeli military operations.

Prohibition on the use of force

Article 2(4) of the United Nations Charter prohibits the use of force in interstate relations. There are compelling arguments that Palestine meets the legal requirements for state sovereignty, particularly after being admitted as an observer state to the United Nations and becoming a party to various treaties, notably the Statute of the International Criminal Court. However, there are differing views on the extent to which Palestine should be considered a state under general international law, or only for specific purposes ("functional state sovereignty"); see here.

, here and here .

But even if Palestine were not allowed to be a state under general international law, the ICJ has confirmed that Palestinian territory, based on customary law, enjoys territorial integrity and is therefore protected against the use of military force. This customary law prohibition has been applied in the Israeli-Palestinian

The conflict found expression in the ***Wall*** case (2004), where the ICJ held that "the principles relating to the use of force enshrined in the Charter reflect customary law" (para. 87). The Court also noted that "the principle of self-determination of peoples is enshrined in the Charter of the United Nations and reaffirmed by the General Assembly in resolution 2625 (XXV) […], according to which 'Every State has the duty to ***refrain from any act of force which deprives the peoples referred to [in that resolution]… of their right to self-determination*** '" (para. 88, emphasis added).

This means that Israel does not have the right to use force in territory where the Palestinian people can exercise their right to self-determination unless Israel can demonstrate a specific legal basis for doing so. In this regard, it is noteworthy that Security Council Resolution 2720 (2023) emphasized that "[t]he Gaza Strip constitutes an integral part of the territory occupied in 1967" and that the Council "reiterated the vision of the two-state solution, with the Gaza Strip forming part of the Palestinian State."

Since Israel withdrew from Gaza in 2005, it cannot legally re-enter the area with military forces unless such renewed territorial control can be based on the exercise of the right to self-defense.

Moreover, before the events of October 7, 2023, Israel claimed that Gaza was not occupied territory. Accordingly, Israel's military operations, according to its own statement, could not be based on the rights of an occupying power under international humanitarian law [here and here].

Right to self-defense

Substantively, there can be no doubt that the October 7 attack constituted an "armed attack" within the meaning of Article 51. However, in its ***Wall*** advisory opinion, the ICJ denied Israel the right to self-defense against terrorist attacks for two reasons. First, the Court stated that Article 51 governs relations between states and that Israel had not claimed that the attacks originated from a state. Second, the Court noted that Israel exercises control over the occupied Palestinian territory and that the threats originated from that territory (paragraph 139). Nevertheless, the Court recognized that Israel has the right, and even the obligation, to protect its citizens within the limits of international law (paragraph 141).

The acceptance of Palestinian statehood has widely increased in the 20 years since the ***Wall*** opinion. What is more, a fundamental difference between the legal status of the West Bank and Gaza today is that Israel continues to exercise territorial jurisdiction over the former territory but since its withdrawal in 2005, not over Gaza. The underlying reason for the Court denying Israel the right of self-defense in the ***Wall*** must be explained by Israel's jurisdictional control over the West Bank. This is different in Gaza where Israeli authorities have not been physically present after 2005. Therefore, the prohibition against self-defense on occupied territory should not apply in Gaza, regardless of whether Gaza generally is considered occupied.

The ICJ recognized in ***Wall*** that 'the existence of a “Palestinian people” is no longer in issue'. It further noted that this has been accepted by Israel in an exchange of letters of 1993 with the PLO (para. 118). PLO has represented Palestine as observer in the UN General Assembly, see UNGA Resolution 67/19 (2012) [here]. Hamas won the Palestinian parliamentary elections in 2006 and has territorial control over Gaza.
Nevertheless, it is the PLO that generally represents Palestine at the international level [here and here], including in territorial issues, peace and security.

Therefore, the Hamas attack on 7 October cannot be attributed to Palestine, whether it should be considered a state or a 'self-determination unit'. This raises the question of the extent to which a state (Israel) has a right to self-defense against attacks from a non-state actor (Hamas). The rejection of self-defense against non-state actors in the ***Wall*** was criticized by a minority of the judges and the question was left open in ***Armed activities*** (2005) (para. 147). The scholarly debate has continued under the label of the 'unable or unwilling' doctrine, see eg here, here and here. I will not go into the debate about the extent to which a state has the right to self-defense against non-state actors, but in the following only assume that states have such a right.

Restrictions on the right to self-defense

In any case, the exercise of the right to self-defense must respect the customary international law requirements of necessity and proportionality. Proportionality is generally seen as comprising four elements, ie the legitimacy of the reason for rights limitation; the suitability of a measure for obtaining the purpose; the necessity in the sense that the least restrictive measure should be chosen; and, finally, the balancing of the benefit of the measure relative to the importance of protecting the obligation (the ***stricto sensu*** analysis) [here and here]. The principle of proportionality is generally accepted as the appropriate approach in the balancing of protected rights and, on the other hand, other legitimate interests [here].

The Israeli military operations should be examined in relation to these proportionality elements. First, Israel was clearly allowed to halt and repel the Hamas attack. Moreover, the liberation of the hostages is a legitimate purpose. Self-defense arguably also allows the prevention of reasonably foreseeable future threats. However, many have challenged the reasons for and overall effect of the massive operations. They may be seen as expressions of illegal punishment or revenge. The ICJ has, in its provisional measures in the case raised by South Africa [here], not even excluded a genocidal purpose.

We do not have clear guidance from the ICJ and state practice about how to operationalize the ***stricto sensu*** balancing in different contexts. But there is general agreement among scholars that proportionality in jus ***ad bellum,*** as expressed by Kretzmer, 'includes (but is certainly not limited to) damage to combatants and military objects'. Recent scholarship by Tams and Brückner, Henderson and O'Meara also shows that states and scholars have condemned the Israeli military intervention in Lebanon in 2006 and earlier military actions in Gaza (2009, 2012 and 2014) as disproportionate. In the Gaza context, it is, on the one hand, not obvious that the massive Israeli attack, with

the extensive loss of life and destruction, is well suited to secure the release of the remaining hosts. It is also difficult to imagine that Israel would once again face a surprise attack comparable to what happened on 7 October. On the other hand, the losses and damages in Gaza are strikingly more dramatic than the ones experienced in Lebanon in 2006. If the destructions in Lebanon could be considered disproportionate, Gaza is clearly beyond the limits of lawful ***ad bellum*** use of force.